

**JAINAH BINTI SEMAH v. MANSOR BIN IMAN
MAT AND ANOTHER.**

[Orig. Civ. Juris. (Taylor, J.) March 15, 1951]

[Raub — Civil Suit No. 4 of 1950]

Personal law—Evidence of customary law admissible—Adoption among Pahang Malays—Custody after death of adoptive parent—Enforcement of decree.

The personal law of Malaya is communal. The personal law of the Malays is composed of two main elements—ancient Malay custom and Mohammedan law—the latter having been adopted in varying degrees in different places but nowhere to the total exclusion of the earlier customary law.

Evidence is admissible to prove that a particular custom applies even though it be at variance with the Mohammedan Law.

Muhammad Ismail Khan v. Lala Sheomukh Rai⁽³⁾ followed.

Ramah v. Laton⁽¹⁾ discussed and held not to be binding.

Adoption is a recognised part of the personal law of the Pahang Malays. Where a child has been adopted by a married pair and the husband dies, the adoptive mother is ordinarily entitled to the custody of the child.

Quaere: Whether such adoption is in any event revocable.

A decree for custody may be enforced by a local Chief without formal process.

Cases referred to :—

- (1) *Ramah v. Laton* 6 F.M.S.L.R. 128 (C.A.).
- (2) *Woon Ngee Yew v. Ng Yoon Thai* (1940) F.M.S.L.R. 128; (1941) M.L.J. 37.
- (3) *Muhammad Ismail Khan v. Lala Sheomukh Rai* 17 C.W.N. 97 (P.C.).

ACTION.

The parties were not represented.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Taylor, J. :—In this action a Malay woman claimed the custody of a girl twelve years old on the ground of adoption.

The plaintiff and her husband, whose name was Jalil, adopted the infant daughter of Jalil's brother and brought her up from birth to the age of eleven years. The adoptive father died and shortly afterwards the natural father took the child, by force and stratagem, away from the adoptive mother. The child thereafter lived, not in her original home but in her paternal grandfather's house.

It was clear that the grandfather was the real defendant and also that the trouble arose, in part, because the plaintiff, who was a native of Trengganu,

wished to go back to her own relatives there, taking the child with her.

The main questions to be decided were whether what happened amounted to a legal adoption and, if so, what is the position where the adoptive father dies and the blood relations compete with the adoptive mother for the custody of the child.

The Ketua Kampong gave evidence that adoption is a recognised institution or practice among the Pahang Malays and that the parties are usually related but may be unrelated. He could not say whether any stipulations are usually made as to maintenance or property and he had never known a case either of the natural parents claiming to have the child returned to them or of a question having arisen on the death of an adoptive parent. This witness was independent and responsible; I accepted his evidence.

The grandfather of the child, who is the Ketua of another Kampong and also a naib kathi, agreed that the child had been adopted but he contended that the adoption was by Jalil alone, not by Jalil and his wife jointly; he conceded that adoption of a baby by an unmarried man "does not happen." Further, he contended that adoption is revocable by the "guardian" if the child is in moral danger and that according to Mohammedan law he, the grandfather, was the guardian of the child.

This witness was a passionate partisan but he was the only witness for the defendant, so it is necessary to examine his evidence. Obviously, if any right of revocation exists it must be exercisable by the natural parents, so long as they live. The parents of this child were the nominal defendants; the father was present but did not contest the case in any way. Also it was clear that the grandfather was confusing Malay custom with Mohammedan law and this directly raised the question whether evidence of this kind is admissible. In *Laton v. Ramah*⁽¹⁾ a majority of the Court of Appeal held that such evidence is not admissible. They said that a question arising on the death of a husband was a question of "the law of the land" which must be propounded by the Court; witnesses must state facts, not law; if, however, it were a matter of foreign law, which is treated as fact, it could only be proved as such, either by an expert witness or by authoritative publications. In effect they held that all law must be, either the law of this country or the law of a particular foreign country. Both these propositions are fallacious; the Mohammedan law is not foreign law in that sense; it varies from country to country; also, in many instances, it varies in some respects between different communities in the same country; the Judges shut

their eyes to the fact that Malaya is one of those countries which apply different rules of law to different classes of subjects according to their races and creeds so that it is necessary to find to which of these a person belongs before the particular rule applicable to his case can be known. Thus, the only "law of the land" is that the personal law depends upon the community; to determine the actual rule is a matter of evidence.

Although the judgment in *Laton's* case was reported more than twenty-five years ago I cannot find any case where it was followed, or even cited. There are, however, several later cases where it was not followed. For instance, in *Woon Ngee Yew v. Ng Yoon Thai*⁽²⁾ the Court of Appeal treated Chinese family law as a matter of evidence. In principle, there is no possible distinction, for this purpose, between Chinese customary law and Mohammedan or Hindu law; all are of foreign origin and each forms part of the personal law of a local community.

What is sometimes called "pure Mohammedan law" does not recognise adoption in the sense of this case but the relevant law of these States is not pure Mohammedan law; the treaties call it "Mohammedan law as varied by Malay custom"; historically, that is put the wrong way round; the personal law of the peninsular Malays is composite; it is ancient Malay custom modified or supplemented by subsequent adoption of part of the Mohammedan law; the extent to which the Moslem law has superseded the customary law varies from place to place but no where has the customary law wholly disappeared.

In *Muhammad Ismail Khan v. Lala Sheomukh Rai*⁽³⁾ a case very like *Laton v. Ramah*, *supra*, the Privy Council expressly ordered evidence to be admitted to prove a customary rule of inheritance at variance with Mohammedan law.

For all these reasons I am clearly of opinion that the decision of the Court of Appeal in *Laton v. Ramah* is not a valid authority. It is in direct conflict with an earlier decision of the Privy Council and also with later decisions of the same Court. It stands alone; it has often been disregarded, consciously or unconsciously, and it cannot be followed.

The evidence being admissible, and part of it having been accepted, I find that the practice of adoption exists among the Malays of central Pahang and I recognise it as part of their personal law.

Whether an unmarried person can adopt a child is a question which does not arise here and must be left open; I would remark in passing that I can see no reason why an elderly woman should not adopt a girl

or young woman, as often happens in other places. Where, however, as in this case, a young infant is adopted by a married couple the adoption must, in the nature of things, be by the couple jointly; it is not revoked by the death of the adoptive father, if the adoptive mother survives.

Whether it is revocable in any circumstances is another open question. I only decide here that if it is revocable, the right to revoke is vested in the natural parents; the child's grandfather cannot intervene to revoke it over their heads.

The plaintiff therefore succeeded on the main issue but custody is always a matter for discretion which must be exercised in the interests of the child. At the time of the trial the plaintiff was living in a houseboat which was probably not a very good home for a girl of twelve, (though the attack made on the plaintiff by the grandfather was almost certainly exaggerated). I therefore gave the adoptive mother the custody subject to the condition that she carried out her avowed intention of going to live with her own family in Trengganu.

On the question how such a decree should be enforced, the learned Assistant Registrar at Raub, Che Ismail, pointed out that several difficulties might arise; he suggested that the actual transfer of custody might be arranged by the Penghulu of the mukim. I entirely approved the idea of trying informal methods first and the Registrar accordingly sent a sealed copy of the decree to the Penghulu, with an official letter requesting him to carry it into effect. Within a few days the Penghulu not only effected the transfer of the physical custody of the child but also settled a monetary dispute between the parties which would otherwise have been the subject of troublesome proceedings.

Order accordingly.

LEONG HOI KOW v. CHAN HO YAT.

[App. Civ. Juris. (Thomson, J.) March 13, 1951]

[Ipoh — Civil Appeal No. 30 of 1950]

Landlord and Tenant—Control of Rent Ordinance, No. 6 of 1948—Possession—Non-payment of rent—waiver of part irregularities in payment—Rent in arrears for fourteen days or upwards.

The appellant in this case was the landlord of premises known as No. 68 Treacher Street, Ipoh. The respondent became the tenant of the premises sometime in 1941 and was at the commencement of this case in occupation of same. The appellant sued for ejectment of the respondent from the premises and other relief on the ground that the respondent's tenancy had been terminated by notice dated 15th June, 1950, with effect from 1st